

Notes

Understanding the Model of Rules: Toward a Reconciliation of Dworkin and Positivism

I. Introduction

In his essay *The Model of Rules*,¹ Professor Ronald Dworkin argues against a theory of law which he attributes to H.L.A. Hart and a school called "positivism." The positivist is said to embrace three tenets. (1) The laws of a community are rules, distinguished by the manner in which they were adopted or developed. (2) Faced with a hard case—one not covered by a legal rule—a judge must decide it by exercising his "discretion"; that is, he must amend an old rule or write a new one, looking for guidance outside the law. (3) Someone has a legal obligation when a legal rule requires him to do or forbear from doing something, so if a judge decides a case by exercising discretion he is not enforcing a legal obligation. Dworkin maintains that all three tenets are unacceptable, but his chief target is (1)—the conception of law as a system of rules whose membership is determined by a generally accepted test. The doctrine of discretion and theory of legal obligation turn out to be unwanted implications of the model of rules applied to judicial decisionmaking.

Dworkin's strategy against the model of rules is to establish: (A) that the law includes "principles," which are not rules; and (B) that no generally accepted test can settle whether a principle is or is not law. It is remarkable that contributions to the model of rules debate have dealt exclusively with (B), attempting to produce some criteria for the legality or non-legality of principles. They have touched only tangentially, if at all, on Dworkin's thesis (A) that principles are an essential part of the law. It is remarkable because, in *The Model of Rules* at least, thesis (A) is the argument for (B). Granted, (B) may be true though (A) is false; there may be no good reasons for treating principles as law, yet decisive reasons why no master test could pick out all and only the rules of a legal system. But if Dworkin has failed to show that the conception of law as a system of rules is untenable so that an adequate model of law must include principles,

1. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), reprinted as *Is Law a System of Rules?* in *ESSAYS IN LEGAL PHILOSOPHY* 25 (R. Summers ed. 1968) [hereinafter cited as Dworkin]. Page numbers in brackets refer to the Summers collection.

then *his* case against the master test is undermined. This Note is a defense of the model of rules against (A), Dworkin's thesis of legal principles.

His brief for principles is in outline as follows:

1. Judicial opinions in hard cases allude to principles and policies, which are not rules but which are reasons for results.
2. Principles might be:
 - (a) considerations that judges refer to as a matter of personal predilection; or
 - (b) "binding" on judges in the manner of legal rules; *i.e.*, considerations that judges must take into account as indicating a result.
3. The doctrine of discretion forces the positivist to treat principles as in 2 (a), while a denial of discretion permits one to embrace 2 (b).
4. The positivist is unable to show that principles cannot "bind" judges; and without principles no rules would be "binding."
5. If principles are "binding standards" they are law, so when judges rule in hard cases on the preponderance of principles they enforce legal obligations.

Obviously this is not an argument that principles are law. (In 4, the affirmative point is premised upon a bald assertion that principles will supersede established legal rules, and the "objections" to principles are posed by straw men.) But it is a compelling invitation. The crucial move occurs at 3, where Dworkin asks his reader to abandon the doctrine of discretion and with it the denial that judges enforce legal obligations in hard cases. These are unhappy positions, and one might be persuaded, if not convinced, to drop them and the model of rules as well. By the same token, however, Dworkin's invitation to treat principles as law is less compelling if one can accept the model of rules without adopting unacceptable views.

This Note maintains that the model of rules gives a satisfactory account of hard cases, and that Dworkin's alternative should be rejected. Of course, if (as he believes) "positivism" takes the position that law is a system of rules exclusive of Dworkin's principles, then this Note is a defense of positivism in one of its forms. But a defense of positivism so taken is one thing; a defense of any particular legal positivists may be another. To secure the latter, it might be argued that Dworkin has simply mistaken the positivists' ideas—that Hart, and others who think that law is essentially a system of rules, in fact

shun the second and third tenets of Dworkin's "positivism" and hold instead some more palatable views. That is possible, but it is not the present approach. While the model of rules as developed below is *consistent* with Hart's work, there is no need that he or any other legal theorist does or would so understand it; Dworkin claims success not only against Hart's but against *any* conception of law as rules without principles. The argument here is that Dworkin claims too much. This is not to say that he has misunderstood his known adversaries and so missed the mark against *positivists*. Rather, Dworkin has not demonstrated the model of rules as such to be fatally defective or untenable, and so has not refuted *positivism* as he conceives it. Therefore, subsequent talk about the positivists need not be taken as alluding to any particular individuals, and Hart will be referred to only for purposes of understanding Dworkin's contentions.

To be discredited are Dworkin's analyses of hard cases, principles, and legal rules. The conceptions of law and the legal process that emerge from them lend credence to his charges that the model of rules is unacceptable. The foundation for a correct understanding of these topics is laid in the section immediately following. In subsequent sections it is shown that insofar as Dworkin gives any coherent description of hard cases they are analyzable in terms of rules of law and legal rules; that none of Dworkin's principles can, without being linked to a rule, determine someone's legal obligations, and so cannot justify a result in a hard case or indeed in any lawsuit; and that Dworkin's erroneous belief that the model of rules precludes a satisfactory account of hard cases and legal obligation is attributable to his misunderstanding of validity and the nature of legal rules. Again, it should be emphasized that this Note does not deal directly with such issues as whether any more satisfactory analysis can be given of principles, and whether the admission of principles into the inventory of a legal system precludes a separation of what is law from what is not. This Note is rather directed to the narrower question of whether some form of the model of rules might survive Dworkin's attack, and the word "principles" should always be understood to mean principles as he conceives and describes them.

II. Rules of Law, Legal Rules, and Decision

In this section a distinction will be drawn between "rules of law," and "legal rules." Two important qualifications must be made at the

outset. In the first place, it is not pretended that Anglo-American lawyers *invariably* use these terms in the ways described here. But it is suggested that much of their language so conforms, that the distinction is important, and that attention to it is necessary if certain features of law are to be properly understood. Secondly, this Note leaves open the question whether "rules of law" and "legal rules," or some equivalents, must appear in any adequate theory of individuation. That is to say, these are not held to be necessary elements in any theoretically unexceptionable division of the total content of a system of laws into smaller units of legal material. Rather, the distinction is drawn in order to mark certain kinds of entities to which lawyers frequently refer. "Rulings," "legal rules," and "rules of law" are expressions whose verbal resemblance invites confusion, and a correct understanding of the model of rules depends upon careful differentiation among the things they denote.

A "ruling" is the decision or result in a particular case. It belongs only to the case for which it is handed down, and is explicable by indicating which of the parties "won" or "lost." A *rule*, on the other hand, is not a result. Though it is sometimes said that a decision "produced" a rule, when lawyers and others make such statements they have in mind the status of the ruling as precedent, and are alluding to part of the explicit or implicit rationale for the ruling or result.

Lawyers talk of "rules" in diverse contexts, and some uses of the word are technical. A "rule" to show cause, for example, is probably just a contraction of "ruling"; it is, at any rate, one of those special uses of the word which should not be troublesome. Sometimes lawyers distinguish "legal rules" from "rules of law." Although the terminology is not rigorous, there is a tendency to give the name "rule of law" to statements like "the use and release of hydrocyanic acid constitutes an ultra-hazardous activity," and "a seal imports consideration," while calling "legal rules" such statements as "a carrier by water may terminate its special liability for goods by giving actual notice of arrival to the consignee" and "a pedestrian on the paved portion of a roadway shall walk to the left of the center line."² Of course, the basis for the distinction is more important than the expressions we choose to designate the two classes. The full statement of a *legal rule* con-

2. Normally there would be some provision for crossing the road—either an exception or definition or term modifying "pedestrian."

veys certain information.³ Any rule can be formulated in a sentence which (a) identifies one or more classes of human actions (*e.g.*, walking), and, sometimes, a manner of performance (*e.g.*, to the left); (b) indicates by the use of a modal word (*e.g.*, "shall") whether some actions are required, forbidden or permitted; and (c) identifies the person or class of persons whom the rule concerns (*e.g.*, pedestrians).⁴ A *rule of law* does not lend itself to such expression. It resembles a definition, or description, or instantiation of a concept—ways in which one might respond to a request like "Give me an example of (What is?) an ultra-hazardous activity."⁵ The phrase "under penalty of law" could be appended to the pedestrian regulation as a reminder that it is a legal rule of obligation which will be enforced by the appropriate public agencies. Adding this phrase to rules of law would be an absurdity.

Rules of law stand somewhere between legal rules and rulings. In fact, they are often the "rules" that rulings produce. This is because a rule of law is a compendious statement of fact and law. It records a conclusion that some set of facts—describable, say, as "the use and release of hydrocyanic acid"—falls under a legal rule that concerns a certain state of affairs—say, "an ultra-hazardous activity." Rules of law do not lay down legal rights and obligations; they are predicative statements. Rules of law are not parts of legal rules; they are *about* parts of legal rules. In calling them "rules" we presuppose a practice of adherence to precedent, and their rule-like quality is due to the instruction that they supply.⁶ Thus, they are "rules" by dint of norms of institutional responsibility (such as one that requires judges to treat similar cases in similar ways) which relate them to certain official activities, especially acts of the judiciary. The importance of rules of law, and why lawyers and others might treat them as part of the law, is explained by their utility. Rules of law are a practical desideratum where legal rules are broad in scope and where precedent counts, for they give brief expression to inexhaustibly complex relationships of fact and law; by specifying and detailing the

3. A single rule can be expressed in an indefinite number of ways. It would be misleading to say that the sentences "pedestrians on the paved portion of a roadway shall walk to the left of the center line" and "persons on foot must keep to the left of the center line when they walk upon a paved road" state two different rules, rather than one rule in different words.

4. M. BLACK, *The Analysis of Rules*, in *MODELS AND METAPHORS* 95 (1962) at 107, 108; A. ROSS, *DIRECTIVES AND NORMS* 107 (1968).

5. Of course, it might be *part* of a rule on the use of certain words, affecting certain people.

6. M. BLACK, *supra* note 4, at 113-14.

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range of persons and situations that individual legal rules concern, they promote certainty and uniformity in the administration of the law. As definitions in legal codes they save repetition and secure the applicability of a rule where there might otherwise be doubt. Rules of law are, perhaps, dispensable; they may not be an essential feature of a legal system, but they are a significant practical asset.

People may comply with or violate the law, and not just "the law" generally, but a law or several laws. Consider the legal rule that a pedestrian on the paved portion of a roadway shall walk to the left of the center line. It is complied with if the statement "a pedestrian is on the paved portion of a roadway and walks to the left of the center line"—which may be called "the indicative of the rule"—is true.⁷ If the indicative of a legal rule is contradicted by a true description of the actions of some individual to whom the rule is applicable, then that individual has violated the legal rule. In contrast, it would not ordinarily be said that someone had run afoul of (or obeyed) the "rule" that a seal imports consideration. Questions of compliance do not arise in connection with rules of law. They have legal significance where they are tied to legal rules and thereby influence reasoning about cases coming under the law.

A legal rule is "applied" when an official acts on it, using the rule as a source of information about legal requirements and as justification for a ruling.⁸ Two decisions are crucial: (a) the decision that the rule is *applicable*; and (b) the decision that the rule *should be applied*. These are not usually separated; in most cases they can be, and are, treated as one with the question of the applicability of a rule. The two are radically distinct, however, for they turn on different kinds of considerations. (a) A court is expected to apply a rule to a case only after testing its stipulations against the facts of the case; the parties and their conduct, which are before the court, must belong to the classes of persons and actions designated in the rule.⁹

7. The idea and terminology are S. Körner's; see *CONCEPTUAL THINKING* 19-20 (1959). This treatment of indicatives of rules is simplified. First, the indicative is true in one sense if our pedestrian walks to the left only momentarily, all the rest of the time walking to the right. But notice that he has violated the rule too, for a description of his actions would also contradict the indicative. Second, of course, courts apply rules after the facts, so the indicative statement is couched in past tense. These time factors complicate the analysis somewhat, but do not vitiate it. Finally, the indicative is unrestricted, referring to "a pedestrian," while application of the rule requires that the indicative be particularized to individual pedestrians. This is again just a technicality and such matters are discussed in works on deontic logic.

8. MacCallum, *On Applying Rules*, 32 *THEORIA* 196 (1966).

9. See p. 916 *supra*.

So a court will entertain our traffic regulation if a sub-indicative of the rule corresponds to a true description: "Defendant was a pedestrian on the paved portion of a roadway." If this sentence truly describes the state of affairs we would say that the rule is "applicable."

(b) Sometimes legal rules are applicable, but there is doubt whether they should be applied. Suppose a defendant were found to have violated the pedestrian rule while rushing to pull a child from the path of traffic. Most likely it would be urged that a penal law should not be applied here regardless of its applicability. And were a penalty imposed the court would be faulted, not for its judgment that the law was applicable, but for its decision to apply that law.

It was observed that the two decisions are seldom distinguished. The applicability of a rule is a *prima facie* reason why it should be applied, and in an ordinary case once an established rule is found applicable its application follows straight away. The decision to apply the rule is a *moment* in the court's move to application, but it is not a separate step. Difficult questions, if any, concern the fit of facts to the terms of the rule. They may be very difficult indeed if the case is a "hard" one. But the issues raised by this type of hard case are conceptual and linguistic (*e.g.*, "Was defendant a 'pedestrian'?"); the judge must decide on the factual significance of certain words and phrases in certain contexts.

If it seems that an applicable legal rule should not be used, a judge must come to a decision of another sort. Here the considerations which disfavor a rule's application will not be divergences of facts from the settled meanings of the terms of the rule. Instead, they will include one or more social or moral values¹⁰—justice, administrative efficiency, mercy, deeply-rooted custom, the popular will, state interest, political ideals, the general welfare, and so on. If application of a rule threatens important values or ends, and if the anticipated evil is judged to exceed the good that might be realized by its application, then an official should discard the rule for the case at hand.¹¹ Conversely, in some cases it may seem that a rule should be applied where it is not clearly applicable; the proposed extension of a rule's use formally

10. This may seem to draw the distinction too sharply, for some legal rules invoke value-laden concepts or standards, such as "unconscionability" in rules of contract. One might feel that decisions on such rules are intermediate between the two noted here. There are good reasons that count against separate treatment of these rules, but the point is not worth arguing here. A tripartite classification is only slightly more complicated.

11. If this seems to make application of a law depend on a kind of cost-benefit analysis rather than considerations of right, "formal" justice, or the judge's duty, let it be emphasized that these figure in too, and they may well be determinative.

resembles the situation where use of an applicable rule is questioned, and it requires a decision on the same grounds. Decisions on the application of a legal rule, like decisions on its applicability, may be tough or easy. A hard case, where estimation of the relative plusses and minuses is difficult or where the interests seem to cancel out, can try the wisest court. The case of the pedestrian mentioned earlier is, on the other hand, rather easy. A court could be expected to recognize the injustice of punishing someone for heroic deeds, and to see that if the rule were applied the very interests the rule is designed to serve would be retarded, without commensurate benefit. These cases calling for decisions to apply, or not to apply, established rules are among the most interesting in law, and law school casebooks abound in them. For simplicity, discussion has been limited to the single-rule situation; it illustrates all of the basic features of judicial reasoning that are presently important. Complex cases, where established rules of unquestioned applicability compete for adoption as the ground of a ruling, require a series of the kinds of decisions just examined. Where a case poses a choice among valid, competing rules, the "best" rule is one which is of greatest importance within the legal system and the application of which will look to realize the greatest net benefit in terms of relevant values.¹²

Convenience warrants a pair of new terms. Where a single rule is applicable but it is uncertain whether the rule should be applied, and in cases where it is doubtful that any rule is applicable and where no established rule of law settles the matter, it may be said that a decision is "underdetermined." If two or more rules are applicable (or otherwise compete for application) to a case, the law "overdetermines" the decision.¹³ In underdetermined and overdetermined cases alike, careful judgments about language and value are important steps in the decision process. A good judicial opinion will usually indicate the kind of decisions involved in the case.

Attention has been called to two kinds of judicial decisions regarding

12. To leave the analysis at this may seem to elide almost all of the important questions about judicial decisionmaking—those involving the institutional responsibilities of judges which are implicated in all decisions regarding the applicability and use of rules, and others concerning the appropriate ranking of values for various cases. But there is no answering these questions here; complex cases are the favorites of legal scholars, who will devote an entire essay to the dissection of just one. Space limitations aside, the formula just stated is less vague and mysterious than Dworkin's "weighing" of principles (see Section III *infra*), and the reader will have no trouble extrapolating from the single-rule examples. Enough has been said for present requirements.

13. Overdetermined cases may or may not involve conflicting rules. In general, two rules conflict when they indicate contrary results in some case. There are various kinds of possible conflicts among rules, a discussion of which cannot be undertaken here.

legal rules, and to two kinds of cases in which these decisions are difficult. Now both kinds of decisions, in both kinds of cases, can generate rules of law. In the case of decisions on the applicability of a rule, this is obvious. One of the samples introduced earlier is just such a rule of law. "The use and release of hydrocyanic acid constitutes an ultra-hazardous activity" is an answer to the question whether rules of tort liability for "ultra-hazardous activity" are applicable in a certain case.¹⁴

A decision to use or to pass over a rule can also produce a rule of law. Again, this is familiar to lawyers. In many areas of the law, but perhaps most dramatically in criminal cases, courts decide on the acceptability in light of social and moral values of proffered justifications and excuses for violations of legal rules, and these decisions are cited for rules of law. Civil suits can have the same kinds of consequences, as a couple of well-known cases will illustrate. Plaintiffs in *Tedla v. Ellman*¹⁵ had been struck by a negligently driven car and filed suit for damages. At the time of the accident plaintiffs were walking on the right-hand roadway, and the pedestrian rule mentioned above was part of the traffic code. Defendant urged that they be denied recovery. He cited two established rules: that plaintiffs should be denied recovery in tort where their conduct amounted to contributory negligence, and that courts should find negligence in a breach of statutory regulations. Acknowledging the applicability of both rules, the court declined to apply them to plaintiffs' case. It judged that a finding of negligence here would defeat the purpose of the statute, which aimed to keep pedestrians from endangerment by automobiles, and that defendant should not benefit by the rules. *Tedla v. Ellman*, then, is authority for the proposition that in certain circumstances violation of the pedestrian statute is not contributory negligence—a new rule of law.¹⁶ Similarly, in *Webb v. McGowin*¹⁷ the court of appeals of Alabama applied a rule of doubtful applicability. Plaintiff had once saved McGowin from harm at the cost of disabling injuries to himself. The grateful McGowin promised him an allowance for life, and paid it regularly. When McGowin died his executors discontinued the payments, and plaintiff sued in contract. Established

14. *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948).

15. 280 N.Y. 124, 19 N.E.2d 987 (1939).

16. The New York Court of Appeals also refused to apply a valid and applicable rule in *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), producing a new rule of law under the wills statute. The case is discussed in detail below.

17. 27 Ala. App. 82, 168 So. 196 (1935).

rules provided that a subsequent promise to pay for services gives rise to a valid contract only if the services were requested by the promisor, and it was admitted that plaintiff had not sacrificed himself at McGowin's bidding. However, the court reversed a nonsuit and ordered a trial on the facts even though, as the concurring opinion stated explicitly, plaintiff's case seemed clearly outside the rule. Its decision tied to the request rule a rule of law: together with moral obligation, a subsequent promise of compensation is tantamount to a previous request for the compensated services.

III. Hard Cases and the Need for Principles

In the previous section the differences among rulings, rules of law, and legal rules were explored and their relationships to the process of adjudication explained. The elaboration there was wholly consistent with the conception of law as a system of rules. The present section will examine Dworkin's argument that hard cases expose the inadequacy of the model of rules and compel the legal theorist to embrace Dworkinian principles. It will be suggested that the argument fails because cases of the kind that Dworkin must exhibit do not arise for a law court, that judgments of legal obligation in situations answering to his description of a hard case are predicated on legal rules alone, and that his alternative account of judicial decision-making is for the most part distorted and in any event suited only to a simple equity jurisprudence.

Dworkin's treatment of hard cases is intended both to point up the inadequacy of Hart's model and to sensitize the reader to the importance of principles. He invites the reader to consider the reasoning of judges who are confronted with a hard case, where established rules seem not to indicate a result, citing as examples *Riggs v. Palmer* and *Henningsen v. Bloomfield Motors*.¹⁸ It is said to be the contention of Hart and the positivists that an official charged with deciding rights and obligations of parties must in hard cases reach a result by "exercising his discretion." Dworkin is careful to distinguish this from a requirement that the official exercise *judgment* in applying the law. "Judgment" is called for when a rule "cannot be applied mechanically" because it is vague or hard to follow, or for some other reason.¹⁹

18. 32 N.J. 358, 161 A.2d 69 (1960).

19. Dworkin 32 [45].

Occasions for judgment are unobjectionable; any legal theory must recognize that decisions about what the law requires in a given case may be controversial, or at least initially in doubt. Occasions of *discretion*, in contrast, are those in which there is no law to be applied. A judge with discretion is in a position with respect to some case where "he is not bound by any standards from the authority of law."²⁰ This seems to suggest a dilemma. Most would say that our courts enforce legal rights and obligations, but if judges have discretion in hard cases like *Riggs* and *Henningsen* then their judgments are not judgments based on law. A hard case cannot turn on a legal rule because with a rule on hand it would not be a hard case; the result would be stated in the rule itself. Yet rules are all that the positivist will call "law." The positivists' doctrine of discretion, therefore, entails something that is at best counter-intuitive, and at worst subversive. It leads to the conclusion that results in difficult lawsuits stand on extra-legal grounds, among which the judge may pick and choose without authoritative guidance, and that the results are not judgments of pre-existing legal rights, but follow acts of ex post facto judicial legislation.

There is, according to Dworkin, an alternative to positivism. Judges in *Riggs*, *Henningsen*, and like cases reach results after citing various *principles* and *policies*. Now principles and policies—*i.e.*, moral requirements and social goals—are more or less relevant to wide ranges of cases, and there will always be some for the judge when rules fail him. Moreover, the judge will find principles and policies differing among themselves in weight or importance. He weighs those that tend to favor plaintiff's position against others that favor defendant and the preponderance determines who shall prevail. Principles, then, determine directly the result or ruling in a hard case.²¹ Granted, the

20. *Id.* at 35 [48].

21. This is an important point, and Dworkin's position here is so unusual that some comment seems desirable. Moral and social goods are usually thought of as justification for a *law*, rather than as justification for a ruling in a court case. *Rulings*, in turn, are not justified by principles and policies, but by laws that serve principles and policies. Indeed, Dworkin sometimes lapses into this conventional analysis. (For example, he says at 38 [51] that principles and policies justify changes in legal rules.) But there is no doubt about his intentions. (See the statements quoted at notes 32 and 39 *infra*.) Principles are to serve as the law in hard cases. Their result-justifying role (if they have one) is what puts principles on a level with legal rules, and legal rules are law *par excellence*—"the cutting edge of the law," as Dworkin says. It would seem, in fact, that Dworkin *must* attribute a result-justifying function to principles, rather than the more familiar rule-justifying function. If principles and policies justified the adoption of new legal rules in court, as they do in the legislature, then Dworkin would have to demonstrate that nonetheless courts do not legislate in hard cases—that this rule-creating activity differs from a legislature's law-making. For unless the rule-creating of courts were fundamentally different from that of legislatures, Dworkin could not say (a) that in hard cases courts enforce pre-existing legal obligations without implying (b) that in

official will often have to use judgment in such matters, for reckoning with principles can be controversial, but this is nothing like discretion. And if principles and policies are as much law as legal rules, the problem of discretion disappears.

This matter of discretion is the primary reason for Dworkin's discomfort with the model of rules and the motive for his alternative model. A situation in which the positivist credits the judge with discretion, a "hard case," Dworkin says, is one that "is not controlled by an established rule."²² Now what is the significance of this, if it is true? The answer is problematic, if only because it depends in part upon the cases that fit the description, and the description is unclear. Equally unenlightening is Dworkin's restatement of Hart's position. According to Hart, he says, "if someone's case is not clearly covered by [a valid legal rule] (because there is none that seems appropriate, or those that seem appropriate are vague, or for some other reason) then that case cannot be decided by 'applying the law.' It must be decided by some official, like a judge, 'exercising his *discretion*,' . . . manufacturing a fresh legal rule or supplementing an old one."²³ But later he says that Hart's arguments, turning on "the fact that some rules of law are vague . . . and that some cases arise (like *Henningsen*) in which no established rule seems suitable," imply "only that judges must sometimes exercise *judgment* in applying legal standards."²⁴ Vacillation of this sort—between "discretion," which is said to discredit the model of rules, and "judgment," which is regarded as innocuous—is not merely uninformative. It perplexes, and the perplexity arises in a main line of Dworkin's reasoning. A fatal defect in the positivists' analysis, Dworkin claims, is the doctrine that there are cases in which an official has discretion. So when it is said that these hard cases are those in which "a judge runs out of rules,"²⁵ the obfuscation invites a search. Just which cases are these?

It is clear where *not* to look. One of the two kinds of hard cases discussed earlier does not qualify here at all. This is the *overdetermined* case, which is covered by more than one valid legal rule. Far from finding that no rule fits or is sufficiently clear, the official con-

the same sense legal obligations pre-exist the *statutes* which purport to establish them. One who found (b) untenable would find good grounds for rejecting (a), and it is (a) that Dworkin is concerned to secure with his principles.

22. Dworkin 34 [47].

23. *Id.* at 17 [29].

24. *Id.* at 34 [47].

25. *Id.* at 35 [48].

fronts a number of clearly applicable rules. And it would make no sense to say that in such circumstances the judge must manufacture a new rule to decide the case. Nor does he write exceptions into rules that are not used, for Dworkin insists that instances of non-use are not exceptions.²⁶ So those acts of judicial legislation which Dworkin discerns in the model of rules, and which he finds so objectionable, belong to *underdetermined* cases. And these are not ordinary cases where rules are unclear as to their applicability or stipulations, so that *judgment* is needed; these are radically underdetermined cases in which a judge is "out of rules." Dworkin says that such cases arise often. But it seems, to the contrary, that they never occur at all.

Suppose someone attempts to recover losses at the track by bringing suit against the tout who gave him a bad tip, and can point to no established rule which makes touts liable. Is this a hard case? Must the judge weigh principles and formulate a new rule? That does not seem necessary. To be sure, there will be a *ruling* that he has failed to make out a cause of action, but it would be a distortion to say that there is now a legal rule concerning the obligations of touts toward their clients. Countless suits are dismissed because the plaintiff cannot find a legal rule to stand on, even if principles are on his side, and no court is therewith "manufacturing a fresh legal rule or supplementing an old one."

It is true that there are unnumbered cases in which rules are, in some sense, manufactured or supplemented. But the senses are trivial, and the "new" rules are not justified by an appeal to principles. For example, in one sense a court may state a "new" rule by reformulating an old one in different words (*e.g.*, the way the rule concerning pedestrian traffic was reformulated earlier²⁷), and since any rule has an indefinite number of possible formulations, so many cases might be taken as laying down "new" rules. Or, a court might "manufacture" a rule which conjoins two or more established rules, but which has not been recognized and applied previously. Suppose a school district brings suit against the parent of a high school freshman for the replacement cost of some lost books. There are two established rules: (a) a schoolchild who loses a loaned book incurs a debt to the school district in the amount of its replacement cost; and (b) parents are liable for the debts of their minor children. Is this a case not covered

26. See pp. 929-30 *infra*.

27. See note 3 *supra*.

by an established rule?²⁸ Yes, in one sense it is. But the court decides in favor of the district, citing the rule that parents are liable to the school district for the replacement cost of loaned books lost by their minor children. Has the court manufactured a new rule, or reached a result after attending to the weights of principles? It has done neither, but simply transformed rules with a theorem of logic.

There are also cases for which no rules are stated in the literature, but which are covered by established rules. Such a case is analogous in relevant ways to prior cases where decisions have turned on relatively narrow rules. Reasoning to the rule of the instant case is sometimes called "inductive." It is, at any rate, a matter of noticing some general legal rule that embraces all of the precedent rules and covers the case at hand. A fully-described example would be tiresome, and unnecessary since schematic expression of the idea is easy. Precedent cases may be represented by sequences of letters, where "A," "B," "C," . . . stand for salient facts, and "X" and "Y" designate rulings for plaintiff and defendant respectively. The rules of the cases are implicit in the facts and results, and the following table would give a schematic portrayal of the state of the law in this area:

Case 1:	facts ADFG,	result X
Case 2:	facts ABEH,	result X
Case 3:	facts ACFG,	result Y
Case 4:	facts ACDG,	result X
Case 5:	facts BDEF,	result Y

Now suppose that the case before the court is ABCD. It meets Dworkin's description of a "hard case" in one sense, but it is obvious that there is an established legal rule that covers the case.²⁹ The rule, which courts have been using all along, indicates a ruling for plaintiff. For fact A is necessary and sufficient for X, unless fact C has been found; but A and D are sufficient for X notwithstanding fact C. Again, in one sense the judge has "run out of rules," and must "manufacture a new one." But once again logical considerations alone indicate an appropriate rule, which was implicit in the courts' practice.

Finally, there is yet another sort of case which, from one point of view, is not controlled by an established rule. Suppose a statute requires that, within a given jurisdiction, motor vehicles be operated

28. See M. BLACK, *supra* note 4, at 125-28; A. ROSS, *supra* note 4, at 166-67 and 174-76.

29. There is more than one.

with lighted headlamps between sunset and sunrise, and it is established in a long line of decisions that drivers who fail to comply with this statute are negligent as a matter of law. For the first time a driver of a go-kart, running it after sunset without lighted headlamps, collides with and injures a pedestrian. The statute defines a motor vehicle as "any mechanically-propelled vehicle, intended or adapted for use on roads." The court must decide whether the go-kart driver is negligent as a matter of law. Is this a hard case? It is true that the decision is underdetermined, in the way discussed earlier. But this case is nonetheless covered by legal rules. There is simply no established *rule of law* as to whether a go-kart is a motor vehicle.³⁰ To say that it is "a hard case" when the first go-kart driver is brought before the bench is only to evince uncertainty as to whether or not a go-kart is a motor vehicle. It is not that the motor vehicle rule cannot be applied and that a new one must be manufactured, for, supposing the kart driver's case is held to fall under the rule, the law is not thereafter said to contain *two* rules which require the use of headlights after sundown—one applicable to go-karts, and another applicable to motor vehicles.

The foregoing may be summarized as follows. Dworkin has proposed that "hard cases" escape the model of rules and confront the positivist with a grave difficulty; the positivist cannot argue that the judge decides a hard case on legal grounds, because the judge is out of rules; so he must say that the judge has discretion and decides the case by legislating new legal rules or amendments to old ones. To test this proposition, cases have been considered in which there were arguably no "established" rules and "new" rules were needed. Now, obviously, when Dworkin says a judge is out of rules in some case he cannot mean that there is just no relevant legal rule, because plaintiff's inability to find any favorable legal rule would keep him out of court altogether. So Dworkin must mean that in a hard case the judge is out of rules in some other sense. But then hard cases posed no difficulty for the positivist. In two kinds of cases a new rule was "manufactured" in a sense so trivial as not to amount to legislation. These were instances in which the "new" rule is merely a reformulation of an old one, and in which the "new" rule is an amalgamation of two or more old ones. There were, in fact, only two creditable varieties of "the hard case." One calls for reasoning from analogy, or

30. See pp. 914-17 *supra*. Adapted from *Burns v. Currell*, 2 Q.B. 433 (1963).

else something like induction from a set of restricted rules to a broad covering rule, but it does not reach beyond established rules. The second kind of hard case requires not a new legal rule but a new rule of law, and therefore involves no more than careful judgment in applying extant rules. Nowhere has the judge been forced to legislate in deciding the case; nowhere has there been a glimpse of the positivist bogey of discretion.

It might be objected that these speculations have proceeded upon a caricature of Dworkin's hard case model, and that a positivist has a judge exercising discretion in any case where there is no established rule that is applicable on its face. In *those* circumstances, it is said, a judge must either (1) use an old rule, or (2) use a new one. If the former, some rule must be amended to be applicable; if the latter, the judge has fabricated a rule; in either case, the judge legislates *ex post facto*. This objection, if it does not just restate the original obscurities, can be taken in various ways, relative to the meanings of "established rule" and "applicable." If a rule is applicable on its face, then it can be applied "mechanically," as Dworkin says, provided that there are no overriding reasons why it should not be applied. Now cases where rules cannot be applied mechanically are, on Dworkin's own account, occasions for *judgment*; they are *not* occasions of discretion; consequently, they do not undermine the model of rules. For failure to exhibit a favorable legal rule will keep the case out of court altogether, or makes it one of the putative "hard cases" just discussed, all of which turn up exercises of judgment rather than judicial legislation.

So perhaps the objection rests on some conception of an *established* legal rule, and a hard case is one where no applicable rules are "established" in quite the appropriate sense. But there seems to be no satisfactory account of what it means for a legal rule to fail of establishment in the requisite way. (a) If it signifies that in some form the rule has not been previously *stated* by some authority, then this is too severe, for it denies that a rule can be reformulated, or that a conjunction of two legal rules is yet a valid rule. (b) If it means that the rule has not been previously *recognized* by a court or legislature, taking "recognition" here to be explicit, the over-restrictiveness remains, for it has been seen that recognition may be implicit. And whether a legal rule has been recognized implicitly is a question for careful judgment rather than fiat. (c) If it means that the rule has not been *applied* to some previous case on all fours with the hard case, then the criterion confuses legal rules with rules of law and eradicates the distinction between

judgment and discretion. There appears to be no sense of "established" suited to the needs of Dworkin's argument.

Perhaps the remarks about (c) in the preceding paragraph will not satisfy someone who contends: "So much the worse for the rule of law/legal rule distinction. In talking about legal rights and obligations the question is whether operators of go-karts (to use an earlier example) are under a legal obligation to use headlights. That is the question to the court for which the established rules have no answer." The contention rests on a mistake, however. There are at least *two* questions before the court:

- (1) Is the operator of a motor vehicle under a legal obligation to use headlights?
- (2) Is the operator of a go-kart the operator of a motor vehicle?

Because answers to (1) and (2) imply an answer to

- (3) Is the operator of a go-kart under a legal obligation to use headlights?

the court need not find a rule of obligation that contains "the operator of a go-kart" among its terms. Overlooking this bit of logic and collapsing (1) and (2) into (3) may lead to the belief that there is no legal rule that imposes the subject obligation on kart drivers. But that is the mistake. The motor vehicle code might provide such a rule.

However, suppose that the point can be amended. It might be urged that legal rights and obligations pertain to individual persons (such as the defendant before this particular court) and not to classes of persons (such as go-kart operators). Someone might then say that the law distributes rights and obligations among individuals, so that if no established rule declares whether defendant had the obligation in question then a judge who decides in the affirmative is, by the positivists' account, creating a legal obligation *ex post facto*. Now it is undeniable that individual persons bear legal obligations, but this is not because proper names are somehow written into the law. Given the fact that defendant was operator of a go-kart, he had an obligation to use headlights if the correct responses to questions (1) and (2) are "yes." Supposing (1) can be answered in the affirmative on inspecting the vehicle code, question (2) makes the kart driver's case a hard one. But legal obligations are established by the code; a court does not create them by a decision on (2). First, the fact that some-

one's legal obligations are *affected* by its answer does not make (2) a question *regarding* legal rights and obligations. Its answer is not even of the sort that we would expect from legal rules; it is a matter of class membership or definition—a subject for rules of law. And second, a decision whether the class of kart drivers is a subset of the class of motor vehicle operators calls in any case for an exercise of judgment rather than discretion. The term “motor vehicle” is simply vague, or “open-textured,” and, given Dworkin's observation that vagueness or open-texture in rules can be handled by careful judgment, the decision here merely summons that resource.

Finally, granting that courts do not really manufacture new rules out of whole cloth, someone might stand on the point about courts exercising discretion by “supplementing” legal rules. Earlier it was said that judges do not modify legal rules when their decisions produce rules of law, and one could retort that rules of law *are* modifications of legal rules. The argument goes like this. A rule of law is produced in a case where qualified legal rules are not used, and this rule of law can be taken as an *exception* to those rules. A settled rule *R* becomes a new rule *R'* by writing an exception into it, and this amendment qualifies as an act of legislation and so discretion. But this argument, however plausible, is not available to Dworkin because he expressly rejects the idea that occasions of non-use can be treated as exceptions to laws. A distinguishing feature of a legal rule, Dworkin says, is the enumerability of its exceptions—they are part of a complete statement of the rule in question. Of course, he does not mean that we could state all the occasions in which a rule would not be used. As he says of principles, “We do not treat counter-instances as exceptions They are not, even in theory, subject to enumeration, because we would have to include . . . also those numberless imaginary cases in which we know in advance that the principle would not hold.”³¹ Now there are “numberless imaginary cases” in which we know that a legal rule would not hold, and the cases we cannot even imagine are also numberless. If principles do not have exceptions because it is impossible to state all the cases in which they would not be followed, then, by parity of reasoning, legal rules do not have exceptions in this sense. But rules of law are just the legal results of applications or non-applications of legal rules. So those enumerable exceptions that Dworkin expects to incorporate into the complete

31. Dworkin 26 [38].

statement of a legal rule are not rules of law, but something else unspecified. Furthermore, even if Dworkin did not subscribe to the thesis about enumerability and exceptions, the argument about supplementing rules does not show courts to enforce legal obligations that they have created *ex post facto*. To have a legal obligation is to be in a position where a law applies, and when a court applies an established rule in a case, the so-called exceptions to rules not used are by-products of its action. Therefore, in deciding on the basis of an established rule the court enforces an existing legal obligation, notwithstanding any alleged modification its decision might work on other rules.

Hence, on any understanding of "the hard case" that would suit Dworkin's purposes, it seems that his problem situation for the model of rules is vacuous. What is amiss? It might be that Dworkin lacks a clear idea of what a flesh and blood legal case involves, or else thinks it unimportant, for his "difficult lawsuits" are hard to imagine. Moreover, Dworkin's alternative model of the judge's predicament seems quite implausible. He talks as if litigants had to argue a hard case out solely in terms of principles and policies, since no rules are applicable. Then he treats the judge's job as a matter of taking plaintiff's and defendant's principles in the balance, marking the tilt, and announcing the winner.³² No one can object that Dworkin has made it too easy; lawyers and judges in such cases would indeed have a very rough time. But his model of the judge's task is disturbing in what it highlights. For example, just about *any* judicial proceeding could be described as requiring a decision in favor of one side or the other, in an utterly trivial way. Moreover, Dworkin's model seems of a piece with certain kinds of quasi-judicial proceedings like arbitration, criminal sentencing, and divorce settlement. What is significant and characteristic about the conclusion of a case at law is the way it relates to the outcomes of other cases; therein lies the core of its "legal" quality—that it draws upon and lays down rules and reasons which are authoritative guides for human activities, that it is retrospective and prospective. Now if Dworkin's hard cases are to be heard in law courts,

32. Consider the notions implicit in these statements: "A principle like 'No man may profit by his own wrong' . . . states a reason that argues in one direction. . . . There may be other principles or policies arguing in the other direction." (Dworkin at 26 [38]); "[T]he principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another." (Dworkin at 26 [39]). And on the narrowness of a judge's task in a hard case: "[P]rinciples play an essential part in arguments supporting judgments about particular legal rights and obligations." (Dworkin at 29 [41]).

they must arguably resemble previous cases. But then the courts will consider the resemblances and the rules used previously; judges would hardly deal with them in the ad hoc manner that Dworkin envisages. His model of judicial decisionmaking is keyed to proceedings where precedent does not count, and where judges treat cases as isolated sets of facts to be dealt with on their particular merits. But this is not the stance of a judge toward a case at law; indeed, Dworkin's model is best suited to a simplified *equity* jurisprudence, and therefore his treatment of "hard cases" misses much of what is essential to "the law."

So far it appears no fault of the model of rules if the legal cases that elude it are such as Dworkin portrays, for there seem to be no such cases. But, in an effort to save this portion of Dworkin's argument, it might be suggested that *Riggs* and *Henningsen* should be considered. While Dworkin does say that they were occasions for judgment rather than discretion, the suggestion is still worth pursuing, since he frequently calls them "hard cases." It is perhaps just possible that they are the "hard cases" that are to confute the positivist's model of law, with principles at work pointing to results where rules fail to define the relevant legal obligations.

However, by Dworkin's characterization of the "hard case" *Riggs* is on one count disqualified at once, for it involved applicable rules of impeccable validity. The court was asked whether the protection of "statutes regulating the making, proof and effect of wills, and the devolution of property" should be extended to a named beneficiary who had murdered the testator. It sought guidance from the "familiar canon of interpretation" that statutes must be so construed as to give effect to the intentions of the legislators, and that, where intention is imperfectly expressed, "judges are to collect it from probable or rational conjectures only." Of course, the court declined to apply the wills statute. The case turned not on principles in the form of common law maxims (which were cited as evidence that the legislators deemed the matter settled), but on "rational interpretation" of legislative intent. Dworkin implies as much: "In *Riggs*, the court cited the principle that no man may profit from his own wrong as a background standard against which to read the statute of wills and in this way justified a new interpretation of that statute."³³ But this is misleading. What is termed "new interpretation" is a rule of law—that one who murders the testator does not qualify as his beneficiary under

33. Dworkin 29 [42].

the statute. And the "principles" cited in favor of this ruling were treated as ends pursued by the lawmakers, not as the law that defined the parties' rights in the absence of legal rules.

As to *Henningsen*, Dworkin's claims that "the court cited a variety of intersecting principles and policies as authority for a new rule respecting manufacturer's liability for automobile defects"³⁴ are without justification. All of the principles to which Dworkin calls attention are cited when the court discusses the effect of the contract provision with respect to liability of the auto manufacturer. The judges held that "Chrysler's attempted disclaimer of an implied warranty of merchantability, and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity."³⁵ That so-called principle of "special obligation" of the auto manufacturer, which Dworkin believes to be "an essential link in the *Henningsen* argument,"³⁶ is alluded to merely as a reason why "the courts must examine purchase agreements closely."³⁷ Special obligations, and the holding as well, turned on the disparity of the parties' bargaining power, and the use of a standardized contract by the entire industry with seeming intent to avoid statutory liability. Furthermore, the significance of "new" as descriptive of the *Henningsen* rule is problematic; contracts inimical to the public good were voided long before. As to its status as a "hard case," the court hardly found itself "out of rules." Even Dworkin is doubtful. While he claims in one place that it was a case "in which no established rule seem[ed] to be suitable,"³⁸ elsewhere he says that "in *Henningsen* certain rules about automobile manufacturer's liability were altered."³⁹ Put more accurately, *Henningsen*, like *Riggs*, stands for a new rule of law, albeit a relatively complicated one. The controlling legal rule, that valid contractual provisions may not be inimical to the public good, is ancient common law. Boilerplate disclaimers of a warranty implied by statute, if not bargained for by the parties, were held to run afoul of the rule.

Riggs and *Henningsen* have been worth considering because Dworkin cites them when arguing, first, that "principles play an essential part in arguments supporting judgments about particular legal rights

34. *Id.*

35. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 384, 161 A.2d 69, 95 (1960).

36. Dworkin 27 [39].

37. *Henningsen*, 32 N.J. 358, 374, 161 A.2d 69, 85 (1960).

38. Dworkin 34 [47].

39. *Id.* at 38 [51].

and obligations” in hard cases,⁴⁰ and second, that if and only if such principles are binding as law can it be said that “the judge in a hard case . . . is enforcing legal rights and obligations.”⁴¹ Of course, it would be a mistake to think that the whole dispute hangs on a certain reading of *Riggs* and *Henningsen*. But the failure of these cases to illustrate Dworkin’s points should give pause, for he talks as if they will do double duty, as paradigm “hard cases” and as representative decisions with principles. However, neither of them fits his definition of a hard case. Instead they appear to be fairly typical, if extraordinarily interesting, examples of a suit on legal rules, all of which were at hand for the decision. And Dworkin would probably hesitate to amend his definition of a hard case to include *Riggs* and *Henningsen*, for they conflict with his model of adjudication. In neither case were a party’s rights and obligations decided on the preponderance of principles. True, the question whether established rules ought to be applied and which ones, called for close judgment and careful reasoning; relevant principles figured here. But in each case the disputed rights and obligations were found in legal rules rather than in principles and policies, and each decision purported to be a decision of law. So neither *Riggs* nor *Henningsen* could lend any support to Dworkin’s two theses about the role of principles. There is, moreover, another reason why he would abandon them rather than redefine the hard case. In both, the courts’ decisions came to terms with established rules, and if rules are admitted in difficult lawsuits, then the dilemma Dworkin posed is dissolved. A case like *Riggs* or *Henningsen*, however complex and close, still fits the positivists’ model of law and judicial reasoning.

A final observation is in order: if *Riggs* and *Henningsen* represent the way principles give results in hard cases, then there is something wrong with Dworkin’s account of this process. He talks throughout of a hard case as involving an either/or choice between plaintiff and defendant. While this characterization is accurate in the sense that the judge must decide in favor of one party or the other, a hard case in that respect is no different from any other. On the other hand, Dworkin denies that there could be two conflicting rules covering the hard case between which the judge must choose. The account claims too little, or it claims too much. *Riggs* and *Henningsen* are not presentable as sets of facts, rule-less and in search of consequences, brought

40. *Id.* at 29 [41].

41. *Id.* at 31 [43].

to court for a weighing-up of opposing principles.⁴² Judges took account of relevant social and moral values in deciding whether or not the wills statute should be applied on behalf of Riggs, and in coming to the proper conception of "public good" under the contracts rule in *Henningsen*. And if any weighing was done, judges used something more like a matrix than a balance, and the result was more like a vector than a tip of the scales; no consideration of relevant value belongs exclusively to one side or another. The magnitude of the distortion which Dworkin's model gives to our image of judicial reasoning is seen in his belief (i) that judges changed established rules in the *Riggs* and *Henningsen* cases, and (ii) that they reached their decisions to do so by weighing principles and policies which favored change against those that opposed it.⁴³ It has been seen that the courts fashioned new rules of law, leaving established legal rules intact. But even if Dworkin's first proposition were true, the second is simply fantastic. *Riggs'* judges reasoned about legislative intent, and in *Henningsen* pro- and anti-change principles are nowhere to be found. In contemplating difficulties raised by a case like *Henningsen*, a court could be expected to give short shrift to principles for and against change as such, in favor of deliberation on the legal positions of the parties.

IV. Principles and the Determination of Results

~ The previous section attempted to show, *inter alia*, that there do not seem to be any hard cases as Dworkin conceives them. But it should be observed that he has arguments purporting to demonstrate that the positivist is committed to the existence of Dworkinian hard cases,⁴⁴ and that earlier portions of this Note perhaps do not foreclose the logical possibility that he might produce some suitable examples. Thus, (one could reject Dworkin's portrayal of judicial decisionmaking and yet accept his indictment of the model of rules on the ground that there are cases where in some way principles, rather than rules, settle the parties' legal obligations.) The plausibility of this weakened version of the Dworkin thesis depends upon the soundness of three points: (a) that principles, like rules, can impose legal obligations; (b) that

42. Dworkin says (36 [49]) that sets of principles can determine particular results "[i]f a judge believes that principles he is bound to recognize point in one direction and that principles pointing in the other direction, if any, are not of equal weight."

43. Dworkin 38-39 [51-52].

44. "[I]f a lawyer thinks of law as a system of rules . . . he will come naturally to the theory of judicial discretion . . ." Dworkin 39 [53].

these principles and rules are distinct kinds of entities; and (c) that in virtue of their special properties, principles impose legal obligations where legal rules cannot. What is needed, then, is to examine Dworkin's analysis of principles and legal rules. If his analysis is faulty, Dworkin will be unable to maintain that the model of rules can be replaced by a more adequate model of principles, which will avoid the paradoxes of so-called "hard cases."

Judges must run out of rules, Dworkin believes, because a rule either controls or is irrelevant to a case. In deciding what must follow from a given set of facts, a legal rule will direct "in an all-or-nothing fashion." If the rule can contribute anything at all—that is, if the facts stipulated by the rule are given—then "the answer it supplies must be accepted."⁴⁵ A rule may have exceptions, but if it does they are enumerable; a complete statement of a rule is always possible, and any exceptions will be part of the statement. Principles and policies, in contrast, "do not set out legal consequences that follow automatically when the conditions provided are met."⁴⁶ Some, in fact, do not even indicate conditions for their application. Rather, a principle "states a reason that argues in one direction," and it may be defeated by "other principles or policies arguing in the other direction."⁴⁷ Instances where a principle does not prevail are not treated as exceptions, because "they are not, even in theory, subject to enumeration." Dworkin finds another difference between rules and principles, entailed by the first. "Principles have a dimension that rules do not—the dimension of weight or importance."⁴⁸ When principles "intersect" the conflict must be resolved by estimating their relative weights. But it cannot be said that one rule is favored over a conflicting rule because of its greater weight within the system. "If two rules conflict, one of them cannot be a valid rule," and one must decide which is valid "by appealing to considerations beyond the rules themselves."⁴⁹

Dworkin states that these two differences between rules and principles amount to a "logical distinction." "Both sets of standards [*i.e.*, rules and principles] point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give."⁵⁰ Now, there is an obvious difficulty here,

45. Dworkin 25 [37].

46. *Id.*

47. *Id.* at 26 [38].

48. *Id.* at 27 [39].

49. *Id.* at 27 [40].

50. *Id.* at 25 [37].

and Dworkin seems to be vaguely aware of it, for he admits that neither form nor function is a foolproof mark of a rule or a principle.⁵¹ In fact, this classification problem suggests that there is no logical distinction at all. If the asserted functional differences are differences of degree, it can be objected that Dworkin has simply noticed a variation among rules. Some rules should be applied whenever they are applicable, and others should be applied discriminately. There are rules whose applicability is shaded; one variety stipulates a specific consequence if applicable, and another casts cloudy hints. There is, indeed, no reason to stop here. There may be a third kind of rule, with, say, narrow applicability and vague consequences, and even a fourth kind where these attributes are reversed. Of course, the vague, more-or-less-applicable, sometimes-not-to-be-applied rules might be styled "principles." But a linguistic convention is not an indictment of the model of rules; much less is it a counter-thesis. A verbal distinction, without more, allows that "principles" are just a species of rules. The model of rules has been refined, perhaps, but not refuted. Wanting a demonstration that there is a fundamental, generic difference between (say) vague rules and precise rules, at least in the law, Dworkin has merely impeached the rule-exponent's lexicon. If every distinction without a difference is questionable, it must also be observed that not every difference warrants a distinction.

These objections are insufficient, however. Dworkin will argue that by "rules" one *must* mean to exclude from the law all precepts other than narrow, strict norms that confine a judge like iron bonds, leaving him quite free outside their scope. And, this point aside for the moment, it does seem that there are important differences between legal rules and at least some of Dworkin's principles—differences which are better brought to light at once. Principles and policies are scattered throughout Dworkin's essay. The following list, omitting redundancies, is exhaustive.

- (1) "automobile accidents are to be decreased"⁵²
- (2) "securing title"⁵³
- (3) "protecting automobile consumers"⁵⁴
- (4) "no man may profit by his own wrong"⁵⁵

51. *Id.* at 28 [40].

52. *Id.* at 23 [35].

53. *Id.* at 26 [38].

54. *Id.* at 27 [39].

55. *Id.* at 23 [35] *passim*.

- (5) "in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens"⁵⁶
- (6) "freedom of competent parties to contract"⁵⁷
- (7) "[f]reedom of contract is not such an immutable doctrine"⁵⁸
- (8) "the courts will not permit themselves to be used as instruments of inequity and injustice"⁵⁹
- (9) "courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other . . ."⁶⁰
- (10) "limiting punishment to what the legislature has stipulated"⁶¹
- (11) "the doctrine of 'legislative supremacy' "⁶²
- (12) "the doctrine of precedent"⁶³

The members of this collection fall naturally into groups. Dworkin identifies (1)-(3) as policies, and the rest as principles, though his practice of using "principle" as a generic term for "principles, policies, and other sorts of standards" has perhaps cast "other standards" into the array. Dworkin's taxonomy will serve as a starting point, but further discriminations will be necessary.

Dworkin is relatively clear as to how principles and policies are to be conceived. "We might treat legal principles the way we treat legal rules and say that some principles are binding as law and must be taken into account by judges and lawyers who make decisions of legal obligation."⁶⁴ Then it can be argued that "because such judges are applying binding legal standards they are enforcing legal rights and obligations."⁶⁵ "Once we . . . treat principles as law, we raise the possibility that a legal obligation might be imposed by a constellation of principles as well as by an established rule."⁶⁶ These remarks suggest an hypothesis that is worth testing. The law, it is usually thought, frames obligations; a person meets his obligations by complying with the law, and fails to meet them when he violates the law. It was shown earlier what compliance and violation would mean with respect to

56. *Id.* at 24 [36].

57. *Id.* at 24 [36] *passim*.

58. *Id.* at 24 [36].

59. *Id.*

60. *Id.*

61. *Id.* at 26 [38].

62. *Id.* at 38 [52].

63. *Id.*

64. *Id.* at 29 [42].

65. *Id.* at 31 [43].

66. *Id.* at 45 [59].

rules. But can anyone comply with a policy or violate a principle? Such expressions sound odd, at the very least. The case of a policy may be considered first.

Dworkin cited, as an example of a policy, "automobile accidents are to be decreased." If policies frame obligations, how would someone comply with that policy? Automobile accidents are events, not human actions, and the policy does not even purport to concern persons. No indicative sentence describing the actions of a person could count as satisfying the requirements of the policy as such. This does not mean that the policy cannot "require" certain kinds of behavior, however. We need (a) the proposition that a class of actions will decrease traffic accidents, and (b) a rule which requires such actions of persons within the jurisdiction for which the policy is adopted. With this, we can formulate the indicative of a rule and determine whether or not the policy is "complied with." Inspection of (2) and (3) will show them subject to the same analysis. Thus compliance with, or violation of, Dworkin's policies must be understood as an action falling under a legal rule which is tied to some policy by an empirical proposition, and a policy requires certain human actions only in virtue of the rule.

What about principles? The statement that "no man may profit by his own wrong" is often cited by Dworkin. It obviously concerns individuals, and it forbids them certain things. But "to profit" is not a verb which identifies a class of human actions. Rather, it is an "achievement verb," which asserts that "some state of affairs obtains over and above that which consists in the performance, if any, of the subservient task activity."⁶⁷ "To win" is another such verb. A person who wins does not *act* in a particular way, but only enjoys a particular *status*; to fight and win is not to do two things, but to have engaged in one kind of activity with a certain result. So the principle that fighters may not win does not proscribe an activity (such as fighting) which someone might observe and thereby detect violations of the principle; it rather proscribes winning, which is not a performance at all. Similarly, the principle that wrongdoers may not profit bars no deeds, only an outcome. If the principle that no man may profit by his own wrong is to require or forbid or permit any human actions, then it must be translated into a rule respecting those actions. Second parties, such as officials, might be obligated to do certain things that

67. G. RYLE, *THE CONCEPT OF MIND* 149-53 (1949).

would alter the state of affairs which constitutes success.⁶⁸ As an alternative, some rule might require the wrongdoer to do things which would have this effect. In either case the rule is tied to the principle by a proposition to the effect that doing what is required is a case of eradicating the profit. What is of present importance, though, is that the untranslated principle is, in itself, of no consequence for human activity.

It is plain enough that an analysis of principles (6) and (10) would have the same result. Principles and policies of the sort just discussed may be referred to as "achievement-principles." Other principles on the list, if they do not exactly elude this analysis, seem less amenable to it. It is tempting to treat this as a problem of translation, and to try to reformulate the remaining principles as something like statements of goals, conditions or achievements. The project could be carried out, but at the cost of distortion. Instead, consider (5): "in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens." Someone familiar with the law of contract would recognize at once that (5) is a partial statement of a legal rule—a rule with exceptions, of course, and one which courts may decline to apply, but a legal rule nonetheless. Dworkin says that the positivist is inclined to treat principles as "*rules manqué*."⁶⁹ The anti-positivist, it would appear, is not averse to treating "*rules manqué*" as principles.

Now consider (9): "courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage" This is a descriptive sentence, referring to the practice of judges in dealing with agreements to which a party was coerced in some way. As a description, it may be more or less apt, and, in connection with an obligation of judges to conform in their treatment of similar cases, it may contribute to a decision. But no generalization about what judges in fact do can impose an obligation on an individual judge; much less can it obligate an ordinary citizen. The form of (7) suggests that it should be typed with rules of law, but it is probably an elliptical reference to the ordinary practices of courts, and so has the same significance as (9). These may be styled "synopsis-principles."

The remaining samples Dworkin calls "doctrines," and says that they are sets of principles. He hints that they are special; the prin-

68. Reading "may" as "is permitted to" in connection with an achievement verb strongly suggests that a particular kind of success depends upon the behavior of others.

69. Dworkin 40 [53].

ciples making up doctrines are said to be "conservative" as against "substantive."⁷⁰ But this is no help, and Dworkin does not state any of the implicated principles. Still, doctrines are principles, or allusions to principles, and must be reckoned with. Consider, then, "the doctrine of precedent." Dworkin wants to treat the doctrine of precedent as "law." What would this mean? The question could be approached by thinking of a case in which the doctrine might come into play: a case like those discussed earlier, where a court departs from established legal rules or rules of law, either in the interest of accepted values, or in favor of a competing rule. Supposing the decision could be appealed, the appellate judge would be expected to take one of two stances: if the departure was unjustified he should declare the appropriate law of the case, and reverse the lower court; if, on the other hand, he agreed with the statement of law applied by the court below, then he should ratify it and affirm the decision. But it would not be said that he should reverse or affirm on the doctrine of precedent, or on any principle thereof. It would be bizarre if a judge reversed, declaring, "The rights and obligations of the parties are clearly defined by principles of precedent, and this case should have been decided in accordance with said principles. It was not. Reversed." The statement would be queer because departure from the principles of precedent is not a ground for reversal. But departure from the *law* may be. And a memorandum of law (say, in support of a motion to dismiss) which listed the principles of precedent would be a lawyer's joke, while a memorandum citing appropriate legal rules would be quite in order. This is just because a legal rule, and not a principle or a "constellation of principles" such as the doctrine of precedent, imposes a legal obligation which the courts are expected to enforce.

Thus, in Dworkin's examples may be discerned four kinds of principles or policies, three of which are different from rules.⁷¹ One difference between a Dworkin-style principle and a rule is conspicuous. Rules bear information about what people may, ought, or ought not, do in certain circumstances. Principles do not—at least, not without help from rules. Achievement-principles posit ends to be achieved or values to be realized. Synopsis-principles state what is the general practice of judges, or what some large set of related legal rules tends, on the whole, to require. The content of doctrine-principles is unclear,

70. *Id.* at 39 [52].

71. The fourth, crypto-rules or partial statements of rules, are probably there by mistake.

for reasons already mentioned, but it is plain that neither do they define legal obligations. Nor could a "constellation" of these sorts of principles inform someone about appropriate conduct in particular circumstances. It might be said that the run of judgments in a given type of case tends to promote or retard some achievement, or that the tendency of certain rules is to serve some end, or, more specifically, that the doctrine of precedent links up with values of fairness and justice. But the amalgamation of principles does not tell someone what he ought to do or avoid.

Perhaps someone will think that this survey of principles has attended too closely to the language in which they are expressed, and that apart from their expression principles are not so queer and non-normative. But the results accord with Dworkin's conception of principles and policies, as shown by his own general description of them. A principle, Dworkin says, is "a requirement of justice or fairness or some other dimension of morality"; a policy "sets out a goal to be reached" in the society.⁷² Policies state goals or achievements for the society, and the preceding conclusions about them are confirmed. An objection would find its grounds, if any, in this conception of principles as requirements of morality. It would depend upon how the notion of a moral requirement should be taken, and a long-standing doctrine of moral philosophy can help here. At least since Kant, most moralists have accepted an analysis of moral duty such that to say that one *ought* to do something implies that he *can* do it. This means that morality does not require of a person what he cannot do, and if "ought" has any relation to "obligation" then what a person cannot do he has no obligation to do. G.E. Moore discerned a kind of requirement of morality such that "ought" does not imply "can," and which, therefore, does not impose an obligation. This he called the moral "ideal" to distinguish it from the moral "duty." The former concerns a person's inner life or what one ought to be; the latter concerns external actions or what one ought to do.⁷³ Lately, I.L. Humberstone has re-examined this distinction, introducing the terms "agent-implicating ought" and "situational ought." Only agent-implicating "ought"-judgments "immediately engage the machinery of praise and blame" or "allocate responsibility"; a situational "ought"-judgment recommends or deplores some general state of affairs.⁷⁴

72. Dworkin 22-23 [34-35].

73. G. MOORE, *The Nature of Moral Philosophy*, in *PHILOSOPHICAL STUDIES* 310 (1922).

74. Humberstone, *Two Sorts of 'Ought's'*, 32 *ANALYSIS* 8 (1971).

Do the "requirements of morality" which are Dworkin's principles concern a person's external actions, saying what he ought to do? Are they agent-implicating? If so, why are his examples all ideals or situational oughts, requiring things that no individual *can* accomplish by his own acts? On the other hand, if principles do state moral requirements for a person's external actions, saying what he ought to do, how do they differ from moral rules, any of which might be legal rules? The answers to these questions suggest inevitably that, like policies, principles are concerned with general states of affairs or ideals. Principles are "requirements of morality" in a special sense. But then it is obvious that they cannot impose legal obligations, at least not directly. For it is an essential feature of law that someone has an obligation to do something only if he can do it. This is recognized in the excuse of impossibility—no person is held accountable for failing to do what he could not do, or for doing what he could not avoid. It is difficult to accept the idea of *legal* obligations concerning mental life or hidden character.⁷⁵ So the conclusions reached earlier also square with Dworkin's general description of principles, and exceptions to the linguistic approach are ill-taken. Neither principles nor policies, as Dworkin conceives them, are sources of legal obligations in his hard cases. For principles and policies can determine such obligations only if conjoined with a rule, and, by Dworkin's stipulation, in a hard case the judge has run out of rules.

— A final remark may help to put things in perspective. Earlier, in Section II, it was noticed that social and moral values are sometimes permissible grounds for decisions whether to apply or not to apply settled legal rules, clearly applicable or not. Dworkin's principles look like one or two among the several kinds of values that are relevant to such a decision. They are, as he says, "reasons for a result." But this "result" is not a *ruling*—a decision on the case in favor of one side or the other. Dworkin thinks so, because rulings in cases at law turn on the legal rights and obligations of the parties, and he believes that principles can provide these grounds. The principle-relevant result, however, is a judgment that some rule ought or ought not to be applied in coming to a ruling. A ruling may be the upshot of principles in connection with legal rules, where the question of applying legal rules is appropriately raised and the principles are accepted

75. Morris, *Punishment for Thoughts*, 49 *MONIST* 342 (1965), in *ESSAYS IN LEGAL PHILOSOPHY* 95 (R. Summers ed. 1968).

grounds for evaluating the rules. And if the rule in question and the facts that refer it to principles are so obvious that their statement would be otiose, a ruling may *seem* to issue on principles alone. But the relevant rights and obligations in both cases are framed by the rules, and principles cannot do the job. As projected states of affairs, dispositions, descriptions, generalizations, and so on, they do not impose obligations on the judge or on the parties.⁷⁶

V. The Availability of Legal Rules

Section III suggested that Dworkin could not produce cases which, on the model of rules, called for acts of judicial discretion. In Section IV it was argued that Dworkin-type principles cannot serve as the grounds for rulings in cases where legal rules are absent because such principles do not frame legal obligations. The present section deals with Dworkin's analysis of rules, which is the foundation for his belief that rules are unavailable in difficult lawsuits. If Dworkin's analysis is wrong then his argument from hard cases is worse than empirically vacuous; it rests upon erroneous notions about legal rules, and only on such erroneous notions does the model of rules seem to commit the positivist to an unacceptable account of judicial decisions and legal obligation.

Dworkin wants to say that extant legal rules cannot help a judge to decide a case which is not squarely covered by a rule, so when a judge in that position looks for help he must look outside the system of rules and decide on those grounds. This is so, he maintains, because (a) rules have strictly circumscribed areas of relevance in which they admit of no deviation, and (b) one rule is no more eligible for extension than another, in virtue of the totality of rules. That is, to use Dworkin's terminology, rules dictate results in an all-or-nothing way, and they do not differ in importance.⁷⁷

Earlier investigation of the use of rules in adjudication made out, at minimum, a *prima facie* case against Dworkin's first two propositions about legal rules—(1) that they “are applicable in an all-or-nothing fashion,” and (2) that they “dictate results, come what may.” For a rule of doubtful applicability may yet be applied, and a rule

76. Confinement of the analysis to matters of obligation has left other jural relations—the Hohfeldian powers, privileges and immunities—aside. But this narrowness is no defect for present purposes, inasmuch as Dworkin reduces Hohfeldian relations to legal obligations. See his remark in Dworkin at 17-18 [29].

77. See the exposition of his analysis at pp. 935-36 *supra*.

may be applicable and yet not used. With what reasoning does Dworkin defend his conception of rules, and impute it to the positivists? By way of demonstrating (1) he says:

If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.⁷⁸

Now, surely no one would deny this. For all Dworkin has said is that an applicable rule is either valid or invalid; if valid then it states a legal obligation, and if invalid it is irrelevant. That an *invalid* rule "contributes nothing to the decision" is as much as "an invalid rule is not valid," and it might be added that an "invalid" principle contributes nothing to the decision either. It is no more than a truism, which might be of interest to someone who did not understand our ideas of validity and invalidity. But whatever it may reveal about those concepts, it says nothing about the applicability of rules *as such*.

Dworkin follows the remarks quoted above with an illustration: "This all-or-nothing is seen most plainly if we look at the way rules operate, not in law, but in some enterprise they dominate—a game, for example." The aptness of the analogy is unclear. Dworkin calls to our attention a similarity between the "rule" of baseball that "if a batter has had three strikes, he is out," and a rule of law that "a will is invalid unless signed by three witnesses." But his rule about wills is hardly a representative legal rule. It is a conclusory statement that makes elliptical reference to many rules. Nor could it be a typical rule for Dworkin; a few paragraphs later he says that the vastly different first section of the Sherman Act has come "to function logically as a rule."⁷⁹ Thus his "illustration" already has a look of impropriety.⁸⁰ Now Dworkin wants to show just how rigid is reasoning with legal rules which are like baseball rules, and so he writes: "An official cannot consistently acknowledge that this is an accurate statement of a baseball rule, and decide that a batter who has had three strikes is not out."⁸¹ This is as true as his remark about validity, and no more than that does it show rules to be "all-or-nothing." The official would be inconsistent because Dworkin's "baseball rule" is the major premise

78. Dworkin 25 [37].

79. *Id.* at 28 [41].

80. For disanalogies of law and rules of games, see Part I of Hughes, *Rules, Policy and Decision-Making*, in *LAW, REASON, AND JUSTICE* 101 (G. Hughes ed. 1969).

81. Dworkin 25 [37].

of a syllogism, of which the minor premise is "a batter has had three strikes." Indeed, like the putative rule about wills, this baseball "rule" is not a rule at all. Rather, it is a shorthand way of capturing a complex of rules and definitions which constitutes the game, just as that fragment of the law of wills states a criterion for valid documents which is part of a complex of definitions, hypotheticals, and rules about the institutional duties of officials. Again, there is no argument whatsoever for the "all-or-nothing" of legal rules.

Next, in favor of (2), that rules "dictate results, come what may," there is only Dworkin's word for it, couched in the validity/invalidity distinction. It is unnecessary to rehearse the counter-examples, or the discussion of them. If the baseball illustration is to count as an argument for (2), then the objections of the previous paragraph count as well. But an additional remark is warranted by Dworkin's point about the enumerability of "exceptions" to rules, because it might mislead. He says that where a rule does not "dictate results" it has an exception, and he differentiates principles on this count. Now, it might be expected that exceptions to legal rules are amenable to complete statement, and the point can be conceded if legal rules is his subject. As was seen, however, the word "exceptions" is ambiguous, and if Dworkin means to include as exceptions all those particular instances in which a legal rule would not be applicable, or in which, if applicable, a court would decline to apply it, then his assertion is false.⁸² Rules could not "dictate results" in this way.

Now, Dworkin considers his second thesis about rules and principles—the matter of "weight" or importance—an implication of the first thesis. With the "all-or-nothing" conception of a legal rule discredited, it is well to be equally skeptical about the claim that rules do not have varying weights or differences in prominence—a claim that surely would surprise most lawyers. It seems that they are often called upon to assess the relative importance of legal rules; that, indeed, almost any interesting problem in the law requires such deliberations. But Dworkin would not dispute this fact. His contention is rather that rules as such do not have weights, and that grounds for ranking them lie outside the rules themselves. "Functional" importance is dismissed, as referring to the greater or more important role of the rule in regulating behavior—its degree of use. The point is that

82. See pp. 929-30 *supra*.

"we cannot say that one rule is more important than another within the system of rules."⁸³

Still, it is not easy to see how this point should be taken, or why, in the unlikely event that it is true of rules, it should not be true of principles and policies as well. Dworkin's brushoff of the functional importance of rules will raise an eyebrow when it is remembered that functional importance is a major consideration in testing the relative weights of principles. When we defend a principle as part of our law, Dworkin says, we "mention any prior cases in which that principle was cited, or figured in the argument. We would also mention any statute that seemed to exemplify the principle. . . . Unless we could find some such institutional support, we would probably fail to make out our case, and the more support we found, the more weight we could claim for the principle."⁸⁴ It seems odd that in the case of a principle its frequent invocation bears on its weight, while the functional weight of a legal rule is disqualified. Dworkin gives no reason for this difference of treatment, and it is doubtful that any justification can be given. For surely, in a choice between two legal rules, a court would favor the rule with the greater institutional support, other things being equal. If Dworkin claims that the positivists' model is flawed because the intrinsic weights of rules do not vary, so there is no basis of choice among them, and recommends a model of principles because their weights differ due largely to variation in institutional support, then he is claiming for one theory what he has without reason denied to the other. If, on the basis of institutional support, courts can say that one principle is more important than another within the system of principles, then on the same basis courts can say that one rule is more important than another within the system of rules.

The confusion over functional importance is unfortunate, but Dworkin's argument that rules cannot have different weights in different circumstances fares no better. An obvious counter-example is presented by *any* legal question; one would expect the defamation laws to have little weight in a corporate tax problem but to be of significantly more importance where a private citizen has been falsely accused of immoral behavior. However, Dworkin would probably say that for his purposes relevance is to weight as judgment is to discretion, and that the facts of cases are something "outside the rules" anyway.

83. Dworkin 27 [40].

84. *Id.* at 41 [55].

As we have seen, he proposes that a system of rules cannot confer more importance on one rule than on another. But even this restricted claim is clearly wrong. Indeed, of all counter-examples perhaps none is so devastating as that which Dworkin develops against his own proposition in the course of arguing for it. This argument, like the one for “all-or-nothing” in legal rules, deserves to be quoted in detail.

But we cannot say that one rule is more important than another within the system of rules, so that when two rules conflict one supersedes the other by virtue of its greater weight. If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid . . . must be made by appealing to considerations beyond the rules themselves. A legal system might regulate such conflicts by other rules. . . . [It] may also prefer the rule supported by the more important principles.⁸⁵

The argument here is that a choice between conflicting rules turns on which rule is *valid*, and that this is settled by considerations outside the rules themselves. Moreover, Dworkin admits that these “outside” considerations may be other rules. The argument comes, then, to a reiteration, or an allowance, of Hart’s thesis that the validity of a rule is established by criteria which are not in the rule itself, but which are in other rules of the legal system. On top of that, this point about testing the validity of a rule in no way supports, but in fact refutes, Dworkin’s assertion that rules are equally important within the system. The more important of the two rules, here at least, is just the one which the system’s other rules pick out as valid. The invalid rule, like all invalid rules, is of no consequence in any case—a point Dworkin made when arguing for the “all-or-nothing” use of rules. Finally, there is what was earlier called “the overdetermined case,”⁸⁶ and the question whether competing rules, both valid and applicable, differ in importance in different circumstances. Here a lawyer is likely to answer in the affirmative, feeling that the variation in weight, if not in the rules themselves, is at least related to the system of laws as a whole, or to values associated with the rules in question. But Dworkin ignores the fact that conflicting rules might be applicable to a case because he considers it a problem of validity rather than the quite distinct problem of which valid rule ought to be applied.

85. *Id.* at 27 [40].

86. *See* p. 919 *supra*.

Dworkin suggests no good reason to doubt that the importance of a rule varies in different circumstances, and that choice among valid and applicable rules depends upon their relative importance in a given case. On the other hand, the positivists' model of law accounts for this phenomenon. In reflecting on the use of rules in adjudication, it was noticed that choice among competing legal rules requires an evaluation of each relative to its importance within the system and the goods or evils that its application to the case might produce. These goods and evils are understood in terms of a wide range of social and moral values which may themselves differ in importance from case to case.⁸⁷ Evaluation and ranking of applicable legal rules is a complicated and agonizing task, but lawyers tend to feel that interesting lawsuits are just those in which such difficulties are acute. At any rate, it is a prominent feature of the adjudicative process that valid rules conflict and that they are ranked in particular cases. Dworkin has pointed to nothing in the nature of legal rules which would suggest that they cannot differ in importance within a legal system. No more did he make plausible the assertion that legal rules are narrow and inflexible.

His failures here are important. If the model of rules necessarily admitted cases where a judge could find no guidance from rules simply because no rules clearly covered them, then some doctrine of judicial discretion might be required. But a proper understanding of the model of rules shows that this conception of the judge's predicament is unfounded, and Dworkin's argument to the contrary shows itself to be a mass of confusions and non sequiturs. Earlier, reasons were given for rejecting his claims that judges in fact run out of legal rules and that in such circumstances they rule on the preponderance of principles. Later, Dworkin's principles and policies were found impotent in matters of legal obligation and so unable to ground judicial rulings. Now it is seen that his restrictive account of the use of rules is untenable. On all points Dworkin has failed to demonstrate that the conception of law as rules without principles commits one to a deficient or unwanted view of law and legal obligation. To this extent he has no substantial argument against positivism.

87. Among the values, as we have seen, are some of Dworkin's principles and policies, and he is correct in maintaining that these principles have the dimension of "weight."